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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH MALVIA,

Defendant and Appellant.

D065344

(Super. Ct. No. SCN03057)

APPEAL from a judgment of the Superior Court of San Diego County,

David J. Daniels, Judge. Affirmed.

Lynelle K. Hee, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Joseph Malvia appeals from an order denying his petition for recall and resentencing pursuant to Penal Code section 1170.126, under the Three Strikes Reform

Act of 2012.¹ Appointed appellate counsel filed a brief presenting no argument for reversal, but inviting this court to review the record for error in accordance with *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Malvia did not respond to our invitation to file a supplemental brief. After having independently reviewed the entire record for error as required by *Anders v. California* (1967) 386 U.S. 738 (*Anders*) and *Wende*, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 1996, Malvia was convicted of exhibiting a firearm in the presence of a motor vehicle while personally using a firearm (§§ 417.3, 1192.7, subd. (c)(8)), and possession of a firearm by a felon (§ 12021, subd. (a)). Based on Malvia's two prior strikes, the trial court sentenced him to prison under the three strikes law (§ 667, subds. (b)-(i)) for a term of 25 years to life, plus a five-year enhancement for a prior serious felony (§ 667, subd. (a)(1)).

In December 2012, Malvia filed a petition for recall and resentencing pursuant to section 1170.126. The substantive basis for the petition was Proposition 36, otherwise known as the Three Strikes Reform Act of 2012. As our Supreme Court has explained, "On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012, which amended sections 667 and 1170.12 and added section 1170.126 (hereafter the Act). The Act changes the requirements for sentencing a third strike offender to an indeterminate term of 25 years to life imprisonment. Under the original

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

version of the three strikes law, a recidivist with two or more prior strikes who [was] convicted of any new felony [was] subject to an indeterminate life sentence. The Act diluted the three strikes law by reserving the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender. (§§ 667, 1170.12.) The Act also created a postconviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the three strikes law for a crime that is not a serious or violent felony and who is not disqualified, may have his or her sentence recalled and be sentenced as a second strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126.)" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168.)

The trial court denied the relief sought by Malvia, explaining that Malvia was not eligible for recall and resentencing under section 1170.126 because that provision only applies to those cases in which the commitment offense was not a serious or violent felony as defined in section 1192.7, subdivision (c) or section 667.5, subdivision (c). As the trial court pointed out, Malvia was not eligible for relief because he was found to have personally used a firearm in the commission of the offense of exhibiting a firearm in the presence of a motor vehicle (§ 417.3), which qualifies as a serious felony. (See § 1192.7, subd. (c)(8) [a serious felony includes "any felony in which the defendant . . . personally uses a firearm"].)

Malvia filed a notice of appeal.

II

DISCUSSION

Appointed appellate counsel has filed a brief summarizing the facts and proceedings in the trial court. Counsel presented no argument for reversal but invited this court to review the record for error in accordance with *Wende, supra*, 25 Cal.3d 436. Pursuant to *Anders, supra*, 386 U.S. 738, counsel identified as a possible but not arguable issue: whether the trial court erred in finding Malvia ineligible for resentencing under section 1170.126. After we received counsel's brief, we gave Malvia an opportunity to file a supplemental brief, but he did not respond.

A review of the record pursuant to *Wende, supra*, 25 Cal.3d 436, and *Anders, supra*, 386 U.S. 738, including the issues suggested by counsel, has disclosed no reasonably arguable appellate issue. Malvia has been adequately represented by counsel on this appeal.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

McINTYRE, J.